IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Second Appeal No.141 of 2006
with
Civil Application No. 274 of 2006

1. Kalim Mahomadsab Ansari
@ Mulla and others ..Appellants

vs.

1. Dr.Suleman Fakruddinansari
since deceased by his legal
heirs
1A. Mr.Mazahar-Ul-Haque
Suleman Ansari and others ...Respondents

Shri S.V.Pitre for appellants
Shri V.G.Mujumdar for respondent nos.1A to 1H.

CORAM: S.C.DHARMADHIKARI J
5th September,2007

P.C.

1. This second appeal challenges the concurrent findings against the appellants and in favour of the respondents in the suit for possession instituted by the respondents.

2. The suit for possession was decreed by the Trial Court and that decree is confirmed in Reg.Civil Appeal No.296 of 1992.

3. The lower Appellate Court by the impugned judgment and order delivered on 13th December, 2005 partly allowed the appellants' appeal by setting aside that part of the judgment where the compensation was awarded in favour of the

respondents. In turn, the civil appeal no.838 of 2000 for enhancement of the award of compensation was dismissed.

4. Shri Pitre submits that the issue which goes to the root of the matter is jurisdiction of the ordinary civil court to take cognisance of the claim of the respondents in as much as in his submission, the respondents instituted the suit in regular civil court against the appellants on the basis that they are trespassers in respect of the suit premises. However, the respondents themselves are neither the landlords or owners but allegedly the tenants. He submits that whether the tenants can institute such a suit in an ordinary civil court or not would give rise to substantial question of law.

5. Shri Pitre places reliance upon the Full Bench decision of this Court in the matter of Dattatraya Krishna Vs. Jairam Ganesh Gore reported in 1964 Mh.L.J.750 which has been followed by the learned single Judge of this Court in the matter of Abdul Aval @ Chakuwalla Vs.Sayed Mohammed Ali Usmanali and others reported in 2001(2) Mh.L.J.625.

6. Upon perusal of the judgment rendered by the Court below, I am unable to accept this contention

of Shri Pitre. The plaint averments in this case have been noticed to decide the issue of jurisdiction. The pleading is on the basis that the original plaintiffs claimed tenancy rights over the suit property and are alleging that the appellants/original defendants are trespassers therein.

7. In reply to this plea, the defence raised was that the original defendant is a tenant in the suit premises.

8. Thus, it is well settled that the plaint allegations would determine the jurisdiction of the court and not the nature of the defence. However, if the plaint allegations proceed on the basis that the defendant is a trespasser and has no right, title or interest in the suit property, and defence is raised that he has some right including that of tenancy which is established, prima facie, then, possibly the issue arises regarding the jurisdiction of the ordinary civil court. None disputes that the ordinary civil court alone is a forum, when the suit is for possession on the basis of title and against the trespasser. Unless, the Civil Court’s jurisdiction is ousted by specific provision or impliedly it cannot be held that it does not have jurisdiction. In the present case,

the appellants set up a defence that they are the tenants. That plea was dealt by both the courts below. It is held that there is no right in their favour in respect of the suit property. In such circumstnces, in my view, reliance upon the Full Bench decision of this Court is totally misconceived. In fact, the observations relied upon by Shri Pitre in Full Bench decision would militate against his contention rather than support him. The following observations of the Full Bench are eloquent enough:

> "17. A tenant or a sub tenant who claims his right under the contract with his landlord is also a tenant within the meaning of the Act. His landlord is also a landlord within the meaning of the Act. The dispute between them in regard to possession must also be decided in conformity with the provisions of the Act. Even in a suit brought by a tenant on the basis of his contract, the matter which will be directly and substantially inissue will be (1) whether the plaintiff is a tenant and whether the suit is between a tenant and the landlord as alleged and (2) whether the plaintiff is entitled to relief in regard to possession. These will be the principal

issues which the special court will have to adjudicate upon. It will have to decide these issues directly and not incidentally. Consequently, these issues cannot be the subject matter of a fresh suit under section 29A.

18. This view is in accordance with the decision of the Supreme Court in Babulal Bhurmal's case (1). The Supreme Court has observed (p.959)

'....It is possible to avoid a conflict between the provisions of section 28 and section 29A ona proper construction thereof, then, it is the duty of a Court to so construe them that they are in harmony with each other. It is possible to conceive of cases where in a suit under sec.28 a question of title to premises which does not arise out of the Act or any of its provisions may be determined incidentally. Any party to the suit aggrieved by such a determination would be free to sue in a competent court to establish his title to such premises by virtue of the provisions of section 29A. On the other hand, in a suit where a question of title entirely arises

out of the Act or any of its provisions, the jurisdiction to try such a suit was exclusively vested in the Courts specified in section 28 and no other. That is to say, a title which could not be established outside the Act but which arose under the provisions of the Act by virtue of a claim made thereunder must be determined by a Court specified in section 28 and a title de hors the Act may be determined in any other Court of competent jurisdiction...The Act specially provided that the Courts specified in section 28 shall have the jurisdiction to deal with any claim or question arising out of the Act or any of its provisions and expressly excluded any other Court from having such jurisdiction. It is difficult to accept the suggestion that the Legislature intended, after setting up special Courts under section 28 to deal with such matters, that the same should be re-agitated and redetermined in another suit by a Court not specified in section 28. By enacting section 29A the Legislature clearly intended that no finality should be attached to the decision of a Court trying a suit under section 28 on a question of title dehors the Act. The provisions of the Act

on the other hand clearly indicate that all claims or questions arising out of the Act or any of its provisions, even though they may be in the nature of a title to the premises, were to be determined by the Courts specified in section 28 and no other".

These observationsof the Supreme Court in terms apply to the third class of matters referred to in section 28, viz. any claim or question arising out of the Act or any of its provisions. On the same reasoning these observations will be equally applicable to the other two classes of matters mentioned in section 28. This view finds support in the observations made by the Supreme Court in Raizada Topandas Vs.Gorakhram (1), at p.112 in regard to their earlier decision in Babulal Bhuramal's case (2). It was observed:

"....The Supreme court held (in Bhuramal's case (2)) that a suit which was competent to establish title under section 29-A was a suit to establish title de hors the Bombay Rent Act and not a suit which sought to establish title which required to be

established under the Rent Act itself. It is obvious that in the suit before the Court of Small Causes, it was open to the tenant to claim protection under the Act and by reason of section 28 no other Court had jurisdiction to try that claim;...".

9. In my view, therefore, no error was committed by the Civil Court in entertaining and trying the suit. The civil Court's judgment has been rightly upheld by the lower Appellate Court. Modification thereto is also in consonane with the material placed before the lower Appellate Court. There is no merit in the second appeal and it is accordingly dismissed.

10. In view of dismissal of the second appeal civil application does not survive and hence disposed of accordingly.

(S.C.DHARMADHIKARI J.)